No. 93-943 (2)

Supreme Court, U.S.
FILED
JAN 14 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

In the Matter of the Application of KENNETH A. PERKO, JR.,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules in the Nature of Prohibition, or, in the Alternative, in the Nature of Mandamus,

—against—

THE HONORABLE WILLIAM J. DAVIS, Justice of the Supreme Court of the State of New York, County of New York, MARY E. LYNN, BARNES & NOBLE, INC., and ROCKEFELLER CENTER, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

MEMORANDUM IN OPPOSITION FOR RESPONDENT DAVIS

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MEMORANDUM IN OPPOSITION FOR RESPONDENT DAVIS

Petitioner Perko seeks the issuance of a writ of certiorari to review a judgment of the Supreme Court of the State of New York, Appellate Division, First Department, which 1) denied his application, pursuant to article 78 of the New York Civil Practice Law and Rules ("CPLR"), for an order directing respondent Justice Davis to strike a fine imposed upon peti-

tioner, and, 2) granted the Justice's cross-motion to dismiss the petition (7a-8a).[1]

Statement of the Case

Petitioner, an attorney and corporate secretary for Rockefeller Center, Inc., appeared as a deposition witness representing Rockefeller Center in a personal injury action before Justice Davis (23a, 26a). In a decision and order dated April 6, 1992, Justice Davis imposed a $5,000 sanction on petitioner for his failure to obey the court's orders to answer questions put to him at the deposition (1a-6a).

Petitioner then commenced this article 78 proceeding against Justice Davis, as well as three other parties,[2] seeking to strike the sanction, alleging, *inter alia*, that the fine was imposed without notice or opportunity to be heard and in violation of his due process rights and his privilege against self-incrimination (23a). Justice Davis cross-moved to dismiss the petition for failure to state a cause of action, arguing that the extraordinary remedy of prohibition was unavailable because petitioner had an adequate remedy at law by way of appeal and that, in any event, the Justice had acted within the scope of his authorized powers under CPLR 3126 in fining petitioner for his willfully evasive conduct.

The petition was dismissed by the Appellate Division, First Department, without opinion (7a). Petitioner's appeal as of right was dismissed *sua sponte* by the New York Court of Appeals, upon the ground that no substantial constitutional question was directly involved (9a). Subsequent motions for leave to appeal were denied by both the First Department (11a) and the Court of Appeals (13a). Finally, a motion to the

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[1] References in this form are to the appendix to the petition.

[2] The other three respondents, Mary E. Lynn, Barnes & Noble, Inc., and Rockefeller Center, Inc., were parties to the underlying personal injury action.

Court of Appeals to amend the remittitur was treated as a motion to amend its order denying leave to appeal, and was denied (16a).

Reasons For Denying The Writ

Petitioner seeks this Court's review of the Appellate Division judgment on the ground that Justice Davis's imposition of monetary sanctions against him violated his federal due process rights. However, the Court should deny petitioner's request for the issuance of a writ of certiorari because there is an independent and adequate state law ground to support the judgment of dismissal.

Where the state court enters no written opinion, and the state law ground raised in the record is sufficient to support the judgment, this Court will not take jurisdiction. *See Woods v. Nierstheimer*, 328 U.S. 211, 216 (1946); *Williams v. Kaiser*, 323 U.S. 471, 477-78 (1945). *See also Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54-55 (1934). Here, citing *LaRocca v. Lane*, 37 N.Y.2d 575, 579 (1975), *cert. denied* 424 U.S. 968 (1976) and *Matter of State v. King*, 36 N.Y.2d 59, 62 (1975), Justice Davis sought dismissal of the article 78 proceeding on the ground that such a proceeding is inappropriate to challenge a determination which can be adequately reviewed by direct appeal. Even though petitioner was not a party to the personal injury action, he had standing to appeal an order entered therein if he was "expressly bound" by the order sought to be reviewed. *Brady v. Ottaway Newspapers, Inc.*, 97 A.D.2d 451 (2d Dept. 1983), *aff'd*, 63 N.Y.2d 1031 (1984); *Matter of Male Infant B.*, 96 A.D.2d 1055 (2d Dept. 1983). Here, petitioner was expressly and personally bound by Justice Davis's April 9, 1992 order imposing a fine for his obstructive conduct during the deposition, and therefore had standing to prosecute an appeal from that order.

In light of petitioner's adequate remedy at law, the Appellate Division had an independent and adequate state law ground to support its dismissal of the article 78 petition. Petitioner fails to affirmatively demonstrate that a decision on the federal question was necessary to the determination of this case, and this Court should therefore decline to exercise jurisdiction. *See Lynch v. New York ex rel. Pierson*, 293 U.S. at 54-55.[3]

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[3] In any event, petitioner's due process claims regarding notice and an opportunity to be heard are frivolous. Justice Davis's order demonstrates that petitioner was sanctioned only after repeated admonishments and directions by the court to answer the questions put to him at his deposition (2a-5a). Petitioner was thus on notice that he had to answer the questions and that he faced sanctions if he continued to thwart the court's direction. *See also* Transcript of November 1, 1991, annexed to the Petition as Exhibit 6, at pp. 114-115. The record also indicates that petitioner had an opportunity to be heard on his asserted Fifth Amendment privilege from answering certain questions and that the claim was considered and rejected by Justice Davis (4a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
January 14, 1994

Respectfully submitted,

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